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IN THE

Supreme Court of the United States

October Term, 1964

No. 225

THE MIAMI HERALD PUBLISHING COMPANY, *Petitioner*,

vs.

HAROLD A. BOIRE, Regional Director, 12th Region, National Labor Relations Board, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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HAROLD A. BOIRE, Regional Director, 12th Region, National Labor Relations Board, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Miami Herald Publishing Company ("Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 11, 1965.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 1a-14a; R. 53-68) is reported at 343 F. 2d 17. The *per curiam* order denying Petitioner's Petition for Rehearing from such opinion (Appendix A, *infra,* p. 24a; R. 87) is unreported. The Findings of Fact, Conclusions of Law and Order of the District Court (Appendix A, *infra,* pp. 25a-30a; R. 39-46) are unreported. The National Labor Relations Board's Decision and Direction of Election (R. 14-17), Order (R. 23-24), Decision on Review and Remand (R. 30-33) and Order Directing the Counting of Impounded Ballots (R. 34-35) are not officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 11, 1965 and that Court denied Petitioner's Petition for Rehearing by Order entered on April 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

The Court of Appeals below held that a federal district court does not have jurisdiction under this Court's decision in *Leedom* v. *Kyne,* 358 U.S. 184 (1958) to enjoin a representation proceeding where the Board, although its action violates a specific mandate of the Act, makes a rational, logical or "persuasive" defense of such action.

Accordingly, the questions presented to this Court are:

1. Whether the interpretation of *Leedom* v. *Kyne* adopted by the Court of Appeals below has nullified this Court's decision in *Leedom* v. *Kyne* that a federal district court may enjoin an action of the

National Labor Relations Board taken in a representation proceeding when such action is in violation of a specific mandate of the National Labor Relations Act.

2. Whether the decision of the Court of Appeals below prevents federal district courts from striking down illegal action of the National Labor Relations Board in representation proceedings where such action violates a specific mandate of the National Labor Relations Act.

3. Whether the decision of the Court of Appeals below is in direct conflict with that of the Court of Appeals, District of Columbia Circuit, in another aspect of this same case in *Miami Newspaper Printing Pressmens' Union* v. *McCulloch,* 322 F. 2d 993 (1963) and with decisions of other Courts of Appeal.

4. Whether the Court of Appeals below correctly held that the rule of this Court in *Leedom* v. *Kyne* provides for federal district court jurisdiction to enjoin a representation proceeding only in the situation where the Board, although its action violates a specific mandate of the Act, can make no rational, logical, or "persuasive" defense of such action.

The Court of Appeals below specifically did not decide the merits of the case and this issue is therefore not raised in this Petition.

STATUTES INVOLVED

The statutory provisions involved are Sections 3(b) 6, and 9(c)(3) of the National Labor Relations Act (the "Act"), and Section 606 of the Labor-Management Reporting and Disclosure Act of 1959. These provisions, together with 28 U.S.C. § 1337, the jurisdictional statute under which this action was brought in the District Court, are printed in Appendix B hereto.

STATEMENT

A. The Regional Director's original determination

Petitioner, a newspaper publisher in Dade County, Florida, had a collective bargaining agreement with Local No. 46, Miami Newspaper Printing Pressmen's Union, AFL-CIO (the "Union"), which terminated June 22, 1961. On August 1, 1961 Petitioner's pressroom employees went on strike. Petitioner permanently replaced the strikers.

On May 29, 1962 the Union filed a representation petition with Respondent asking that it be certified as statutory representative for Petitioner's pressroom employees. After hearing, Respondent issued a Decision and Direction of Election, providing, *inter alia,* that the striking employees might vote (R. 16). Such ruling was made in defiance of Section 9(c)(3) of the Act[1] which requires the National Labor Relations Board (the "Board") to issue regulations setting the terms and conditions under which economic strikers who have been permanently replaced are permitted to vote as a condition precedent to such voting. Section 606 of the Labor-Management Reporting and Disclosure Act and Section 6 of the Act, which provisions govern in this matter, provide that such regulations shall be issued pursuant to the provisions of the Administrative Procedure Act. 5 U.S.C. § 1001 *et seq.* The Board has admitted that it has never issued the regulations required by Section 9(c)(3) of the Act. (R. 38-39)

In accordance with the Board's rules for "appeal" from representation election decisions of Regional Directors, established under Section 3(b) of the Act,

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[1] This Section was added to the Act by Section 702 of Labor-Management Reporting and Disclosure Act of 1959.

Petitioner filed a Request for Review of Respondent's Decision and Direction of Election. On July 20, 1962, the Board illegally through the action of one member of the Board, in violation of the specific mandate of the Act that the Board may act only through three members, purported to deny Petitioner's Request for Review.

B. The first attempt to judicially test the Regional Director's actions. The Miami Herald Publishing Company v. Boire, 209 F.Supp. 561 (S.D.Fla. 1962)

On July 24, 1962, Petitioner instituted an action in federal district court to enjoin Respondent from holding the election scheduled for July 25, 1962, in that (i) in clear violation of the mandate of the Act, Respondent intended to permit economic strikers who had been permanently replaced to vote in such election although the Board had never issued the regulations which are the statutory precondition to such voting, and (ii) in clear violation of the mandate of the Act, the Board had failed to afford Petitioner the review of Respondent's Decision and Direction of Election required under Section 3(b) of the Act.

The District Court permitted the election to take place, but impounded the ballots uncounted (R. 17-18). Thereafter the Court, passing on the jurisdictional question, ruled that the complaint "set forth a claim that the Board's action was clearly violative of a specific demand of the Act so as to invoke jurisdiction of this Court . . .", and set a hearing on the merits. (R. 19-22). The Board then entered an order vacating the election and granted Petitioner's Request for Review (R. 23-24). The Court held this latter Board order to be a valid exercise of its discretionary powers and dismissed the case as moot (R. 24-30).

C. The Board's action on review of the Regional Director's decision

In November, 1962 the Board issued a Decision on Review and Remand affirming Respondent's Decision and Direction of Election (R. 30-33). By this Decision the Board explicitly refused to issue the regulations required by Section 9(c)(3) of the Act (R. 32). The prior election having been vacated, a re-run election was ordered. This "re-run" election was held, but counting of the ballots therein was stayed pending the decision of the Court of Appeals for the District of Columbia Circuit in *Miami Newspaper Printing Pressmen's Union* v. *McCulloch, infra.*

D. The Union's judicial challenge of the Board's action on review. Miami Newspaper Printing Pressmen's Union v. McCulloch. 322 F.2d 993 (D.C.Cir. 1963)

The Union challenged the Board's Decision on Review and Remand in federal district court. Petitioner was not a party to this action. The United States Court of Appeals, District of Columbia Circuit, reversing the District Court, specifically found that *Leedom* v. *Kyne*, 358 U.S. 184 (1958) placed jurisdiction of the issue in the District Court. The Court, rejecting the "persuasive" argument of the Board that its actions did not violate any specific mandate of the statute but were instead within its broad discretionary powers, set aside the Board's Decision on Review and Remand and the re-run election. *Miami Newspaper Printing Pressmen's Union* v. *McCulloch*, 322 F.2d 993 (1963).

E. The instant case—the second attempt to judicially test the Regional Director's actions

Respondent then ordered the counting of the impounded ballots cast in the previously vacated first election of July 25, 1962 (R. 34-35). Petitioner thereupon filed the complaint in the instant case invoking the jurisdiction of the District Court under 28 U.S.C. § 1337, and alleging that the action of Respondent in ordering the counting of the ballots was violative of the specific mandate of Section 9(c)(3) of the Act in that Respondent proposed to count ballots of economic strikers who had been permanently replaced which were cast in an election which occurred before the Board issued the regulations which are the statutory precondition to such voting (R. 1-13).

The District Court entered a Preliminary Injunction against counting the ballots (Appendix A, *infra,* pp. 25a-30a; R. 39-46) from which Respondent appealed to the Court of Appeals below. On appeal, the Court of Appeals below reversed and remanded, holding that a federal district court has jurisdiction to set aside a representation election directed by the Board only where the Board, although violating a specific mandate of the Act, makes no rational, logical or "persuasive" defense of its action. (Appendix A, *infra,* 1a-14a; R. 53-68) The Court of Appeals specifically refused to decide the merits of the case, but passed solely on the jurisdictional question. The merits of the case are therefore not raised by this Petition.

REASONS FOR GRANTING THE WRIT

The holding of the Court of Appeals is in conflict with and nullifies the effect of the decision of this Court in *Leedom* v. *Kyne,* 358 U.S. 184 (1958) and the subsequent decisions of this Court interpreting *Kyne;* is

in direct conflict with the decision of another Court of Appeals passing on the question in another aspect of this same case, *Miami Newspaper Printing Pressmen's Union* v. *McCulloch,* 322 F.2d 993 (1963) and with the decisions of other Courts of Appeals; and creates a completely unworkable standard of application of *Kyne* and thus raises a question of great importance relating to the jurisdiction of a federal district court to strike down Board action in violation of a specific mandate of the National Labor Relations Act.

In *Kyne* this Court held that a federal district court has jurisdiction, under its general equity powers, of a suit to enjoin the Board from certifying the results of a representation election held by the Board in excess of its delegated powers and contrary to a specific command of the Act. Now the Court of Appeals below has held that such jurisdiction only extends to cases where actions of the Board in violation of a specific mandate of the Act can not be defended by the Board in any logical, rational, or "persuasive" manner.

The rule of the Court of Appeal would nullify *Kyne.* In fact such a rule would have prevented the federal district court in *Kyne* from granting the relief which was ultimately affirmed by this Court in *Kyne.* For the District Court in *Kyne* specifically rejected a rational, logical and "persuasive" defense by the Board of its actions. *Kyne* v. *Leedom,* 148 F. Supp. 597 (1956). Such a rule is in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit at another stage of this same case. *Miami Newspaper Printing Pressmen's Union* v. *McCulloch,* 322 F.2d 993 (1963). In that case the Court specifically rejected a rational, logical and "persuasive" defense of its actions by the Board.

1. The decision of the Court of Appeals is contrary to the holding of this Court in *Leedom* v. *Kyne,* 358 U.S. 184 (1958). In *Kyne,* the Board had violated a specific command of the Act by ordering the inclusion of both professional and non-professional employees in a bargaining unit without first allowing the professional employees to vote on whether they wished to be included in the unit. The complaining employees filed suit in the District Court for the District of Columbia alleging that the Board had exceeded its statutory power by including professional employees in the unit without their consent. The Board vigorously defended its action by showing a 10 year consistent history of Board decisions and excerpts from the legislative history of the Act, both showing that the Board was entitled to order inclusion of non-professionals with professionals in those circumstances.[2] The District Court, however, found such defense to be without statutory merit and set aside the Board's order. *Kyne* v. *Leedom,* 148 F. Supp. 597 (1956). The Court of Appeals for the District of Columbia affirmed. *Leedom* v. *Kyne,* 249 F.2d 490 (D.C.Cir. 1957). On review in this Court, the Board stated that the only question was whether *"the Board failed to comply with statutory requirements. . . . ."*[3] This remains the sole proper test for application of *Kyne.*

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[2] A summary of the Board's defense, being a portion of the Board's brief to this Court in Kyne, is set forth in Appendix A, *infra,* pp. 20a-23a; R. 75-78.

[3] Question Presented to this Court in *Kyne,* Appendix A, *infra,* p. 19a; R. 74.

The jurisdiction established in *Kyne* is on all fours with the case at bar.

Leedom v. *Kyne:*	*This case:*
Complaint alleged Board violated Act by directing an election without following statutory procedure first requiring a separate vote of certain employees	Complaint alleges Regional Director acting for Board violated Act by ordering counting of ballots cast by permanently replaced economic strickers before Board adopted regulations determining the voting eligibility of replaced economic strikers as required by Act as statutory precondition to such voting.

The issue in the case at bar turns "solely upon construction of the statute." *Boire* v. *Greyhound Corporation,* 376 U.S. 473, 481 (1964). Nevertheless, the Court of Appeals below, finding for the Petitioner with respect to all other jurisdictional attacks made by Respondent, found that Petitioner's action "lacked equity" solely because the Board made a "persuasive" defense of its violation of a specific mandate of the Act, even though such defense might be, on analysis, without merit (Appendix A, *infra,* pp. 9a, 12a; R. 62, 65).

The decision of the Court below has created a new and impossible standard of application of *Kyne.* It has for all practical purposes limited the application of *Kyne* to the single situation where the Board, for purposes of testing the jurisdictional issue, *concedes* it has violated the Act.[4] This, we may be sure, is some-

[4] The Court below noted that the issue in *Kyne* "was narrowed considerably" because "the Board did not contest the Union's allegation that the statutory prohibition has been breached." (Appendix A, *infra,* p. 7a, n. 8; R. 59, n. 8)

thing the Board having lost the jurisdictional issue in *Kyne,* will never again do.

The Court below, in limiting a federal district court's determination to cases where the Board's defense of its illegal actions is not rational, logical, or "persuasive", makes *Kyne* meaningless. We may assume that the Board with its expertise and legal competence can always make persuasive defenses of its actions, however illegal they may be.[5] The Court below admits that a *non-meritorious* defense by the Board of its actions may be "persuasive" (Appendix A, *infra,* pp. 12a-13a; R. 65-66).

This Court in *Kyne* said nothing about degrees of violation of a statutory mandate of the Act. The Board has either violated a specific mandate of the Act or it has not. When a complaint is filed in a federal district court, that court must evaluate whether the case turns solely upon construction of a specific provision of the Act and, if it does, must then decide whether or not there has been a violation of that provision. This must require a decision by the court as to the validity of any defense of its action put forth by the Board. If there has been a violation, *Kyne* says that the court has jurisdiction of the action. The Court of Appeals below, in finding that the federal district court had jurisdiction only when Board action in

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[5] The Board's position in *Kyne* was rational, logical and "persuasive," in the sense that the Court below used that term (Appendix A, *infra,* pp. 12a-13a; R. 65-66). In fact the Board itself labeled its defense of its actions in *Kyne* as "rational." See Title to Section "D" of Argument in Board's brief to this Court in *Kyne.* Appendix A, *infra,* p. 20a; R. 75).

direct violation of the statute can not be rationally defended by the Board, is in direct conflict with *Kyne*.

2. The decision of the Court of Appeals below misconstrues and is in conflict with the decision of this Court in *Boire* v. *Greyhound Corporation*, 376 U.S. 473 (1964). *Greyhound* involved a ruling of the Regional Director, based on resolutions of factual questions after a hearing, that a corporation was a joint employer of certain employees. The Court of Appeals for the Fifth Circuit, misinterpreting *Kyne*, held that the federal district court had power to review this factual decision, determine it to be erroneous, and enjoin the holding of an election based on this ruling of the Regional Director. *Boire* v. *Greyhound Corporation*, 309 F.2d 397 (1962).

This Court reversed, holding that *Greyhound* presented "essentially a factual issue, unlike the question in Kyne, which depended solely upon construction of the statute". *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 481 (1964). *Greyhound* was really only a refinement of *Kyne*, for, despite the holding of the Court of Appeals for the Fifth Circuit in that case, *Kyne* was never intended to give plenary District Court review of questions of fact, but rather was limited to the legal question of whether or not the Board had acted in excess of its statutory powers depending on construction of specific provisions of the Act. See Cox, *The Major Labor Decisions of the Supreme Court, October Term 1958*, reprinted in Gellhorn and Byse, *Administrative Law: Cases and Comment* (1960 ed.), 441, 444, 446, that *Kyne* applied to "[e]very plain violation of a statute rule" as opposed to "a typical case for judicial deference to administrative expertise". *Greyhound* was the latter type of case.

The decision of the Court below reflects its misunderstanding of the meaning of this Court's reversal of that same Court in *Greyhound*. In its opinion below the Court of Appeals stated that it did not interpret *Greyhound* as "expanding the *Kyne* decision to permit the use of the equity powers of a district court to enjoin Board election proceedings whenever the issue is one turning 'solely upon construction of the statute'". (Appendix A, *infra*, p. 7a, n. 9; R. 60, n. 9). But, that is exactly what *Kyne* did hold. *Greyhound* in affirming that holding, did not "expand" it. *Kyne* held, before and after *Greyhound*, that if the complaint shows a violation of a specific mandate of the Act, then a federal district court has jurisdiction to enjoin the Board action being tested.

The Court has this term again affirmed the essential meaning of *Kyne*. After discussing *Kyne* in *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees* v. *Association for the Benefit of Non-Contract Employees*, Nos. 138, 139, and 369, decided April 28, 1965[6] this Court observed: "We think that the [National Mediation] Board's action here is reviewable to the extent that it bears on the question of whether it [the Board] performed its statutory duty. . . ." This Court then specifically considered the merits of the contention that the National Mediation Board had exceeded its statutory authority in failing to use a ballot with space for voting "No Union" and held "that there is nothing to suggest that in framing [the ballot] the Board has exceeded its statutory authority." The Court below, in refusing to hold that the District Court had jurisdiction to determine whether

[6] Unofficially reported at 14 L.ed. 2d 133.

the Board performed its statutory duty, but instead limiting such determination to whether the Board made any rational, logical or "persuasive" defense of its actions, is in direct conflict with *Greyhound* and *Brotherhood of Railway and Steamship Clerks.*

3. The decision of the Court of Appeals below is in direct conflict with decisions of other Courts of Appeal.

In *Miami Newspaper Printing Pressmen's Union* v. *McCulloch,* 322 F.2d 993 (1963), an earlier stage in this very case, the Board strenuously argued that Section 9(c)(1) of the Act did not create a mandatory obligation upon it to certify the results of an election found by it to have been properly directed, but instead contended that this issue was a matter for the Board's discretion. The Court of Appeals for the District of Columbia Circuit, although recognizing the general applicability of the Board's argument, held that it did not apply in the particular circumstances of the case before it. That the Board's defense of its action was rational, logical or "persuasive" did not alter the Court's decision which, depending solely upon construction of the relevant sections of the Act, held that the Board's action was in fact in violation of the Act. The Court of Appeals below has found no jurisdiction with respect to an action of the Board which is at least as clear a violation of a statutory mandate as that before the Court in *Miami Newspaper Printing Pressmen's Union* v. *McCulloch* and is thus in direct conflict with the decision in that case.

Sociedad Nacional de Marineros de Honduras v. *McCulloch,* 201 F. Supp. 82 (1962), aff'd *sub nom. McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 372 U. S. 10 (1963), involved the Board's

contention that it had jurisdiction under the Act to hold an election among alien crewmen of foreign registered ships. Although the Board's contention was based on extensive reasoning and strong Board precedent,[7] this Court rejected the Board's position and upheld the injunction granted by the District Court.[8] *Empresa Hondurena de Vapores, S.A.* v. *McLeod,* 300 F.2d 222 (1962), upheld by this Court in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras, supra,* involved the same facts as *Sociedad.* The Court of Appeals for the Second Circuit, although recognizing the complexity and persuasiveness of the Board's argument, rejected it in a comprehensive opinion. These decisions are thus in conflict with the rule established by the Court below.

4. The decision of the Court of Appeals below creates an utterly unworkable standard for application of the rule of *Leedom* v. *Kyne,* 358 U.S. 184 (1958) and thus raises a question of great importance relating to judicial jurisdiction to strike down illegal administrative action in clear violation of the Act. For judicial control of illegal Board action to be workable, without intervening in factual matters falling within the Board's discretion and expertise, the issue to be adjudicated by the District Court must be (i) whether the question involved is one solely requiring construction of the Act, and (ii) whether the Board's defense of its construction of the Act is correct and valid, not whether it is rational, logical, or "persuasive".

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[7] *West India Fruit & Steamship Co.,* 130 NLRB 343 (1961) cited by this Court at 372 U.S. 14.

[8] "We hold that the action falls within the limited exception of *Leedom* v. *Kyne*. . . . The exception recognized today is therefore not to be taken as an enlargement of the exception in *Kyne*". 372 U.S. 16, 17.

The standard erected by the Court of Appeals below, if allowed to stand, grants the Board unfettered freedom to act as it chooses without any meaningful check on the jurisdictional basis for its actions. This is exactly what this Court prohibited in *Kyne*. In the case at bar, despite the fact that the Board has admitted it has never issued regulations as required by Section 9(c)(3) of the Act, the Court below held the District Court to be without jurisdiction because Respondent made a "persuasive" but possibly nonmeritorious defense of its violation of the specific mandate of that Section of the Act. (Appendix A, *infra*, pp. 12a-13a; R. 65-66).

If the decision of the Court below is allowed to stand, we submit that this Court's decision in *Kyne* will have been nullified and any meaningful judicial control of unlawful Board practices in representation proceedings will have been eliminated. The Board will be able freely to violate the Act, without judicial correction. But "[t]his Court cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of its delegated powers."[9]

Kyne simply cannot mean what the Court of Appeals below construed it to mean, for if such is the case, *Kyne* in fact means nothing. We submit that if *Kyne* is to have any meaning in the future, this Court should grant this petition and overrule the erroneous decision and interpretation of *Kyne* below.

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[9] *Leedom* v. *Kyne*, 358 U.S. at 190.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June, 1965

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20982

HAROLD A. BOIRE, Regional Director, Twelfth Region, National Labor Relations Board, Appellant,

versus

THE MIAMI HERALD PUBLISHING COMPANY, Appellee.

Appeal from the United States District Court for the Southern District of Florida

(March 11, 1965.)

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

GEWIN, Circuit Judge: This is an appeal from an order granting the motion of the appellee for a preliminary injunction which restrains the appellant, as Regional Director for the Twelfth Region of the National Labor Relations Board, from counting the ballots cast in a representation election held under Board auspices on July 25, 1962. The question presented is whether the district court properly exercised its equity powers in enjoining the representation proceedings under the doctrine of *Leedom* v. *Kyne*, 3 L.ed.2d 210 (1958).

The instant suit represents the employer's second attempt to halt the election machinery on the ground that the Board acted in excess of its statutory powers when its regional director ordered that an election be held to determine whether the company's pressroom employees should be represented by Local 46, Miami Newspaper

Printing Pressmen's Union, AFL-CIO. The prior history of this litigation is somewhat involved,[1] but the employer's

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[1] Pursuant to a petition filed by Local 46, the appellant directed that an election be held on July 25, 1962, to determine whether the company's pressroom employees would be represented by the union. His Decision and Direction of Election provided that "also eligible are employees engaged in an economic strike which commenced less than twelve months before the election date and who retained their status as such during the eligibility period. . . ." The Notice of Election, which was issued to implement the Decision and Direction of Election, likewise provided that economic strikers who had been permanently replaced could vote in the election. Since the union had instituted an economic strike at the company's plant on August 1, 1961, substantially all of the company's pressroom employees had been permanently replaced.

On the day before the election was scheduled to take place, the company filed a complaint in the United States District Court for the Southern District of Florida seeking an injunction against the impending election on two grounds: (1) the Board acted in clear violation of the terms of § 9(c)(3) in directing an election in which economic strikers not entitled to reinstatement were allowed to vote without first issuing regulations in accordance with the requirements of the Administrative Procedure Act; and (2) the Board violated the plain terms of § 3(b) of the Act when only one member denied the company's request to review the Regional Director's Decision and Direction of Election. The court allowed the election to proceed as scheduled, but ordered the ballots impounded pending a final determination of the controversy. Before the court could hold a hearing on the merits, the Board, acting through four of its members, issued an order which vacated the prior order of one member denying the company's request for review. It also set aside the July 25 election and granted the petition for review. The Florida district court thereupon dismissed the pending suit without prejudice, on the ground that the valid action of the Board in setting aside the election and granting the petition for review rendered the cause moot. The Miami Herald Pub. Co. v. Boire (S.D. Fla. 1962) 209 F. Supp. 561.

The Board later passed upon the merits of the company's request for review. It ruled adversely to the company with respect to the contention that § 9(c)(3) required the Board to issue regulations to govern the voting eligibility of economic strikers and it explicitly affirmed its prior decision to regulate their franchise

basic complaint throughout has been that, under the 1959 amendment to § 9(c)(3) of the Act, 29 U.S.C.A. § 159 (c)(3), the Board cannot allow economic strikers who have been permanently replaced to vote in representation elections until it has complied with its allegedly mandatory duty to promulgate regulations governing their eligibility.[2]

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rights through the adjudicatory process. Therefore, the Regional Director was ordered to conduct a rerun election.

Before the rerun election could be held, the union attacked the Board's action in a District of Columbia court, requesting declaratory and injunctive relief on the ground that the Board's action in ordering the rerun election constituted a clear violation of § 9 (c)(1) of the Act, 29 U.S.C.A. § 159(c)(1). Ultimately, the Court of Appeals for the District of Columbia agreed with the union's contention that it was entitled as a matter of law to have the Board certify the results of the July 25, 1962, election. Miami Newspaper Printing Pressmen's Union Local 46 v. McCulloch (D.C. Cir. 1963) 322 F.2d 993. The basis of the court's decision was that § 9(c)(1) imposed a mandatory duty on the Board to certify the results of an election once it had itself determined that the election was validly conducted. The court also stated that any procedural defect which may have existed because of the denial of a request for review by one member of the Board was cured by the subsequent action of four members granting the original request. The company was not a party to this proceeding.

Pursuant to this decision, the appellant ordered the counting of the ballots cast in the July 25 election. The company immediately filed the instant suit to restrain the appellant from counting any of the ballots.

[2] Section 9(c)(3) of the Act provides in pertinent part as follows:

> (3) No election shall be directed in any bargaining unit of any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. *Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.* (Emphasis added)

The italicized portion was added to the statute in 1959 to replace an earlier sentence denying the right of franchise to economic strikers who were not entitled to reinstatement.

It is admitted that the Board has never issued regulations in accordance with the provisions of the Administrative Procedure Act, which are applicable to NLRB rulemaking and adjudicatory processes.[3] The Board has consistently taken the position that section 9(c)(3) does not require the promulgation of regulations as a condition precedent to the eligibility of replaced economic strikers to vote in representation elections. Pursuant to the theory that section 9(c)(3) leaves the Board free to regulate the eligibility of economic strikers through the adjudicatory process, it has chosen to decide such questions on a case-by-case basis. See *W. Wilton Wood, Inc.*, 127 N.L.R.B. 1675 (1960); *Tampa Sand & Material Co.*, 129 N.L.R.B. 1273 (1961).

The company's complaint requests that the court declare the July 25 election void, order the ballots destroyed, and enjoin the appellant from conducting any representation election involving the company's pressroom employees until he amends his Decision and Direction of Election to prevent economic strikers not entitled to reinstatement from voting in such an election. The district court concluded that it had jurisdiction of the subject matter, that the complaint stated a "prima facie cause of action," and that plaintiff company was entitled to an adjudication whether section 9(c)(3) required the issuance of regulations as a condition precedent to allowing economic strikers who have been permanently replaced to vote in a representation election. Accordingly, the court entered a preliminary injunction against the counting of the ballots, and this appeal followed. Consequently, we are squarely faced with the question whether under these facts the district court properly exercised its equity powers in enjoining the election proceedings despite the strong congressional policy not to interfere in such matters.

Jurisdiction over the subject matter of this complaint, at least for the limited purpose of determining whether

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[3] See 29 U.S.C.A. § 156. The APA was expressly made applicable to the 1959 amendments by § 606 of the Labor Management Reporting and Disclosure Act, 29 U.S.C.A. § 526 (Supp. 1964).

a claim for relief may be granted, is furnished by 28 U.S.C. § 1337, since this is a civil action arising under an act regulating commerce.[4] The question whether the complaint asserts a claim upon which equitable relief may be properly granted, however, is, affected by the general congressional policy to afford "review" of matters arising under section 9 of the Act only after the Board has ordered the complaining party to take some affirmative action based upon the certification. In accord with this policy, the Supreme Court has held that a Board order certifying a particular labor organization as the exclusive bargaining representative for the employees in the unit is not a "final" order which may be reviewed by courts of appeals under section 10(f) of the Act. *American Federation of Labor* v. *NLRB*, 84 L.Ed. 347 (1940). Consequently, certification orders are normally reviewable only when the Board petitions a court of appeals for enforcement of an order to bargain entered pursuant to section 8(a)(5).[5] The reason for severely circumscribing court interference in representation matters is to avoid dilatory tactics which would postpone the commencement of bargaining when the employer really had no substantial objections to the conduct of the election other than a desire to delay bargaining as long as possible.[6]

In a similar vein, the federal courts have restricted the use of their equity powers to restrain representation proceedings to three very narrow situations. One exceptional

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[4] See Empresa Hondurena de Vapores, S.A. v. McLeod (2 Cir. 1962) 300 F.2d 222, 226-27; Consolidated Edison Co. v. McLeod (S.D.N.Y.) 202 F. Supp. 351, *aff'd.*, 302 F.2d 354 (2 Cir. 1962).

[5] Section 9(d) of the Act specifically provides that whenever an order to cease and desist from unfair labor practices is premised in part upon facts certified following a representation investigation, the entire record in the certification proceeding shall be included in the record on review.

[6] See H.R. Rep. No. 972, 74th Cong., 1st Sess. 5-6; S.Rep. No. 573, 74th Cong., 1st Sess. 5-6; Boire v. Greyhound Corp., 11 L.Ed. 2d 849 (1964); Leedom v. Kyne, *supra* at 216-17 (dissenting opinion).

set of circumstances is presented where the suit tenders "public questions particularly high in the scale of our national interest because of their international complexion." *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 17, 9 L.Ed.2d 547, 552 (1963). Another exception, which has been fashioned primarily by the Second Circuit, comes into play where there is a substantial showing that Board action has violated the constitutional rights of the complaining party. See *Fay* v. *Douds* (2 Cir. 1949) 172 F.2d 720.[7] The third exception,

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[7] In the instant case, the company alleges that the Board's contravention of the statute results in a denial of due process under the fifth amendment. However, a bare allegation that failure of the Board to issue regulations infringes a constitutional right is not substantial enough to vest jurisdiction in the district court or to furnish a basis for the exercise of its equity powers.

Perhaps it should be noted that most of the suits in which "jurisdiction" has been premised on an alleged denial of due process have been instituted by unions whose position as certified bargaining representative has been threatened by Board action independent of a departure from statutory requirements. See, *e.g.*, Milk & Ice Cream Driver's Union, Local 98 v. McCulloch (D.C. Cir. 1962) 306 F.2d 763; Leedom v. International Bhd. of Elec. Workers, Local 108 (D.C. Cir. 1960) 278 F.2d 237; Fay v. Douds, *supra*. Furthermore, the cases have generally required a fairly substantial allegation of a denial of constitutional rights before jurisdiction has been assumed. For example, assertions of a denial of due process as the result of the retroactive application of a Board policy have been held insufficient to warrant injunctive relief. See Leedom v. International Bhd. of Elec. Workers, Local 108, *supra;* Local 1545, International Bhd. of Carpenters v. Vincent (2 Cir. 1960) 286 F.2d 127. In Fay v. Douds, *supra*, the denial of a hearing by the Board which allegedly resulted in a taking of property furnished the basis for "jurisdiction," although the court did not find the allegations meritorious. Furthermore, there is some question whether our prior decisions have recognized this exception, at least where an employer invokes it. See Volney Felt Mills v. LeBus (5 Cir. 1952) 196 F.2d 497, which expressly disapproves Worthington Pump & Mach. Corp. v. Douds (S.D.N.Y. 1951) 97 F. Supp. 656.

on which the appellee relies strongly, is predicated on the Supreme Court's decision in *Leedom* v. *Kyne*, 358 U.S. 184, 3 L.Ed.2d 210 (1958). There the court upheld a district court injunction setting aside a Board election and certification where the Board had clearly acted "in excess of its delegated powers and contrary to a specific prohibition in the Act."[8] 3 L.Ed.2d at 214. The courts have generally interpreted *Kyne* as sanctioning the use of injunctive powers only in a very narrow situation in which there is a "plain" violation of an unambiguous and mandatory provision of the statute. See *Eastern Greyhound Lines* v. *Fusco* (6 Cir. 1963) 323 F.2d 477; *Consolidated Edison Co.* v. *McLeod* (S.D.N.Y.) 202 F. Supp. 351, *aff'd.* 302 F.2d 354 (2 Cir. 1962); *Local 1545, United Bhd. of Carpenters* v. *Vincent* (2 Cir. 1960) 286 F.2d 127; *International Ass'n of Tool Craftsmen* v. *Leedom* (D.C. Cir. 1960) 276 F.2d 514. This exception has been applied to an affirmative requirement of the Act as well as a statutory prohibition. See *Miami Newspaper Printing Pressmen's Union Local 46* v. *McCulloch* (D.C. Cir. 1963) 322 F.2d 993. Nevertheless, it seems clear that, in light of the congressional purpose behind limited review of certification proceedings, representation matters are enjoinable only where the fact of a statutory violation cannot seriously be argued and where the deviation resulted in a deprivation of a "right" guaranteed by the Act.[9]

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[8] In *Kyne*, the Board did not contest the union's allegation that the statutory prohibition had been breached. Therefore, the issue before the Supreme Court was narrowed considerably.

[9] We do not read the recent Supreme Court decision in Boire v. Greyhound Corp., 11 L.Ed.2d 849 (1964) as expanding the *Kyne* decision to permit the use of the equity powers of a district court to enjoin Board election proceedings whenever the issue is one turning "solely upon construction of the statute." 11 L.Ed.2d at 849. The Court emphasized the limited nature of the *Kyne* exception and merely utilized the distinction between fact and law as a ready means of explaining the difference between that case and *Kyne*.

The Board urges that this suit is premature since the company is seeking to enjoin an election prior to the termination of the election procedures. Since the ballots have not been counted, the Board urges that we cannot be certain that the union will obtain a majority of the votes and thus be entitled to certification. In *Leedom* v. *Kyne*, it is true that the union waited to bring its suit until after it had been certified as bargaining representative. However, in the instant case, the company challenges the validity of the entire election, just as the company involved did in *Empresa Hondurena de Vapores, S.A.* v. *McLeod* (2 Cir. 1962) 300 F.2d 222, 229. When this fact is taken into account, it seems clear that the time at which the suit is instituted has little relevance. This is certainly the implied holding of *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 9 L.Ed.2d 547 (1963). Hence, we hold that the suit was not prematurely instituted.

The Board also urges that *Kyne* can be distinguished from the instant case since in *Kyne* a certified union brought the action while in the instant case the complaint was filed by the employer. It is argued that the union's remedy by way of section 8(a)(5) is far more tenuous than the employer's remedy. While this argument might have merit as it relates to a union which has lost an election and thus has no remedy under the Act, it does not seem an entirely satisfactory explanation of *Kyne*. The employer's recourse in the instant case if the union is certified as the bargaining representative depends upon the occurrence of at least two contingencies: (1) the union must decide to file an unfair labor practice charge and (2) the Board must sustain such charge and petition for enforcement of its order. In addition, the Act places a manifest hardship on the employer, for he must run

the risk of incurring a meritorious unfair labor practice charge in order to challenge the validity of the election.[10] However, it must be assumed that Congress was aware of these obstacles to a challenge of election procedures, and that it intentionally made it difficult for the employer to attack election procedures in order to insure that frivolous complaints were not utilized to bring about a postponement of collective bargaining. Therefore, we do not deem a distinction based upon the relative tenuousness of the union's remedy in *Kyne* entirely satisfactory. But see *Volney Felt Mills* v. *LeBus* (5 Cir. 1952) 196 F.2d 497 (per curiam). Futhermore, the Supreme Court did not make the distinction in *McCulloch* v. *Sociedad Nacional de Marineros de Honduras,* 9 L.Ed.2d 547 (1963) or *Boire* v. *Greyhound Corp.,* 11 L.Ed.2d 849 (1964), which were both suits instituted by an employer in a situation similar to that of the Herald in the instant case.

We turn now to an examination of the nature of the company's suit to determine whether the alleged statutory violation is so manifest that the court's equity powers could properly be invoked. The company argues that the language of section 9(c)(3) places an unequivocal, mandatory duty on the Board to issue regulations governing the eligibility of economic strikers to vote in a representation election conducted within twelve months of the commencement of the strike, and that the Board's failure to issue regulations denies a right granted to employers under the Act. In support of this assertion, the company points to excerpts from the legislative history of the 1959 amendment which indicate that Congress contemplated rule-making in accordance with the requirements of the

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[10] The company notes in its brief that it will be in danger of converting the economic strike which presently is in progress at its printing plant into an unfair labor practice strike if it is required to challenge the Board's election procedures by refusing to bargain with the union.

Administrative Procedure Act [11] and intended that economic strikers should not be entitled to participate prior to the issuance of regulations.[12] To bolster this argument, the company notes that where Congress wished to vest the Board with discretion to choose whether to regulate a subject through the decisional process or through the promulgation of legislative rules, it utilized language explicitly recognizing those alternatives.[13] The Board counters this argument by pointing to section 14(c)(1), which was enacted by the same Congress that passed the amendment to section 9(c)(3). The Board urges that where that Congress intended to refer to legislative rule-making powers it knew how to do so; thus, 14(c)(1) provides: "The Board, in its discretion, may, by rule of decision or by *published rules adopted pursuant to the Adminis-*

[11] In its brief the company sets out numerous statements from proponents of the amendment to 9(c)(3). These statements, which were made during the congressional debate on the Labor Management Reporting and Disclosure Act, contain repeated references to the desirability of authorizing the Board to control the voting eligibility of economic strikers by "issuing" or "prescribing regulations." See 105 Daily Congressional Record 5732, (April 21, 1959), 5864 (April 23, 1959), 6850 (May 7, 1959), A7915 (Sept. 4, 1959).

[12] For instance, Congressman Barden made the following statement:

> "It is important to note that section 702 does not give employees engaged in an economic strike who are not entitled to reinstatement an unqualified right to vote. Rather this section provides that they shall be eligible to vote only under such regulations as the Board shall find are consistent with the purposes and provisions of this act."

105 Daily Congressional Record (Sept. 4, 1959).

[13] See, *e.g.*, 29 U.S.C. § 159(c)(2), (4); 29 U.S.C. § 160(c), where the statute refers to "regulations or rules of decision." The Board, however, stresses the fact that none of these sections were enacted by the same Congress that passed the 1959 amendments to § 9(c)(3).

trative Procedure Act. . . ." (Emphasis supplied) Hence, the word "regulation" as used in section 9(c)(3) is not used as a term of art denoting the exercise of the Board's rule-making powers in conformity with the Administrative Procedure Act; instead it merely expresses the will of Congress that the Board be vested with regulatory power over the subject should the Board deem regulation desirable.[14] The Board also urges that the congressional debates on the proposed amendment to section 9(c)(3) clearly demonstrate that Congress did not intend to condition the voting eligibility of economic strikers on the promulgation of formal regulations. The amendment replaced an earlier sentence in 9(c)(3) which prohibited any economic strikers from voting, and the tenor of the entire debate on the amendment indicates that economic strikers should be enfranchised subject to whatever limitations as the Board might from time to time deem consistent with the purposes of the Act.[15] The Board notes that administrative agencies which are vested with both rule-making and adjudicatory functions have some dis-

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[14] In this connection, the Board calls attention to the statement of Senator Kennedy at 105 Cong. Rec. 5864:

> "Our purpose is to permit economic strikers to vote while there is a lawful strike in progress, a strike for a reasonable and proper purpose, and to permit the Board to adopt a rule of reason in making a judgment as to when it would be wise to terminate the right."

[15] For example, Senator Case stated:

> "I personally think that to flatly deny the economic striker the right to vote would be to defeat his right to strike. I think the right to strike ought to be preserved, consistent with the provisions of the National Labor Relations Act. I offer the amendment with the intention to preserve that right, but also to put in the hands of the National Labor Relations Board the power to issue regulations consistent with the act, which would define the period of time and the status of the striker who could vote."

105 Cong. Rec. 5864.

cretion whether to proceed by one method or the other in the absence of a clear congressional directive spelling out a particular method. See *SEC* v. *Chenery Corp.*, 322 U.S. 194, 201-03, 91 L.Ed 1995, 2002 (1947).[16] In controlling the voting eligibility of economic strikers, argues the Board, it chose to regulate through the evolution of decisional rules, approaching the problem on a case-by-case basis because the great number of conceivable factual variations make it eminently suitable for such development.[17] The company, of course, contends that this amounts to rule-making under the guise of adjudication without affording the affected persons the safeguards of the Administrative Procedure Act.

In view of the persuasive arguments which have been advanced on both sides of the question and the ambiguity of the legislative history, we cannot say the Board's violation of the statute, if any, is so manifest that it warrants the invocation of the equity powers of a district court

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[16] The Board relies on our decision in Optical Workers' Union Local 24859 v. NLRB (5 Cir. 1955) 227 F.2d 687, 691, where we stated:

> "We hold in accordance with the Chenery case, supra, that the Board has authority to adopt and reverse policy, either in the form of an individual decision or as rule-making for the future, in any manner reasonably calculated to carry out its statutory duties, without regard to whether such action strictly conforms to the rules applicable to courts or legislative bodies."

[17] The basic test which has been developed by the Board in its decisions is whether the striker retains an interest in the struck job, as "where prior to the election he obtains *permanent* employment elsewhere; or the employer eliminates his job for economic reasons, or discharges, or refuses to reinstate him for misconduct rendering him unsuitable for re-employment." W. Wilton Wood, Inc., 127 N.L.R.B. 1675, 1677 (1960). The Board also presumes that the economic striker retains his status as an employee and that his replacement is permanent. See Pacific Tile & Porcelain Co., 137 N.L.R.B. 1358 (1962).

prior to the issuance of a cease-and-desist order based upon the union's certification. In this connection, it should be noted that the application of the test formulated in *Leedom* v. *Kyne* can conceivably result in a refusal to enjoin election proceedings even though the district court believes the plaintiff's complaint is meritorious.[18] However, it should be made clear that our analysis of the merits of the company's complaint is made only for the limited purpose of determining whether there has been such a plain contravention of a statutory mandate that the district court properly enjoined the counting of the ballots.

Perhaps a word should be said about the fact that this appeal was taken from the issuance of a preliminary injunction. According to the company, once we have determined that subject-matter jurisdiction exists, the issue resolves itself to a question whether the district court abused its discretion in restraining the counting of the ballots. However, as we understand the test the Supreme Court set up in *Kyne,* the question is really whether the complaint will support the exercise of equity jurisdiction at all, even though a sufficient injury can be shown to warrant injunctive relief. See *Consolidated Edison Corp.* v. *McLeod, supra* at 354.

One further point should be discussed. The company's complaint also asserts a right to injunctive relief based upon the fact that the Board vacated the election of July 25 because of an alleged infirmity in the review procedures employed. The company claims that the Board's order vacating that election was held valid as between the Board and the company in a prior decision of the district court. *Miami Herald Pub. Co.* v. *Boire* (S.D. Fla. 1962) 209 F. Supp. 561. While this question was not

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[18] See Empresa Hondurena de Vappres, S.A. v. McLeod (2 Cir. 1962) 300 F.2d 222, at 229 n.6, *vacated and remanded on other grounds,* 9 L.Ed.2d 547 (1963); International Ass'n. of Tool Craftsmen v. Leedom (D. C. Cir. 1960) 276 F.2d 514, 516.

considered by the district court in reaching its conclusions, we feel that we should proceed to examine it at this time. We certainly recognize and adhere to the general principle that a reviewing court should remand a case to the district court for consideration of a question not previously considered there, but we think that in the peculiarly compelling circumstances of the instant case we should dispose of the company's additional allegation. The outcome of this election has already been delayed for over two years. The record does not present a question which involves the resolution of any factual disputes. Furthermore, the company's contention appears clearly without merit. The district court dismissed this suit previously because the Board had vacated its election order and granted the petition for review. The court did not purport to decide that the vacation of the election order was final and valid for all purposes, but merely that the Board could temporarily vacate its own election orders in an attempt to remedy a procedural defect, thus rendering moot the litigation which was then pending. Furthermore, we think that, assuming there was a procedural infirmity because the petition for review was initially denied by only one member of the Board, its subsequent action in granting the petition remedies the defect. See *Miama Printing Pressmen's Union Local 46* v. *McCulloch* (D.C. Cir. 1963) 322 F.2d 993.

We realize that our disposition of round three of litigation in this case paves the way for round four, which could conceivably occur when the company refuses to bargain on the ground the Board could not permit economic strikers to vote in a representation election without first promulgating rules to govern their eligibility. Nevertheless, we feel the congressional policy of severely circumscribing review of representation matters requires that no injunction be issued at this stage.

The case is REVERSED and REMANDED to the district court with directions to dismiss the complaint.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 20982

D. C. Docket No. 63-481—Civil

National Labor Relations Board, Appellant,
HAROLD A. BOIRE, Regional Director, Twelfth Region,

versus

THE MIAMI HERALD PUBLISHING COMPANY, Appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, Chief Judge, JONES and GEWIN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to dismiss the complaint.

March 11, 1965

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20,982

HAROLD A. BOIRE, Regional Director, Twelfth Region, National Labor Relations Board, Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY, Appellee.

Petition for Rehearing

Appellee The Miami Herald Publishing Company, in accordance with Rule 29 of the Rules of this Court, moves for rehearing of the decision and judgment entered by this Court on March 11, 1965, on the following grounds:

1. The Court erred in interpreting the decision of the Supreme Court of the United States in *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. Ed. 2d 210 (1958), as permitting a federal district court to enjoin Board action in contravention of a specific statutory duty solely involving construction of the National Labor Relations Act only when the Board can make no rational defense of its action.

2. The Court erred in determining that *Kyne* does not apply to Board action contravening a statutory duty arising "solely upon construction of the statute", *Boire* v. *Greyhound Corporation*, 376 U.S. 473, 481, 84 S. Ct. 894, 11 L. Ed. 849 (1964), so long as the Board makes a rational defense of its action.

3. The Court erred in overlooking the fact that the new standard it has created does not afford "*judicial protection* of the *rights* [Congress] confers against agency action taken in excess of delegated powers", *Leedom* v. *Kyne*, 358 U.S. at 190 (emphasis added), but instead this new standard of application requires judicial abnegation

whenever the agency action is rationally defended but nonetheless wrong.

4. The Court erred in overlooking the fact that in *Kyne* itself the Board presented a rational, although erroneous, defense of its violation of a specific mandate of the Act with ample citation from legislative history and Board precedent. All applicable portions of the Board's argument to the Supreme Court in *Kyne* are excerpted in Appendix A to this Petition for Rehearing.

5. The Court erred in overlooking the fact that the only question presented to the Supreme Court by the Board in *Kyne* was whether "the Board failed to comply with statutory requirements . . ." and that to answer this question requires the Court in a *Kyne*-type case to adjudicate the defense of its action made by the Board, not merely to determine if the defense is rational or persuasive.

6. The Court erred in overlooking the fact that the Supreme Court decision in *Greyhound*, holding that *Kyne* applied whenever the issue turns "solely upon construction of a statute" (11 L. Ed. 2d 849 at 855) was not "expanding" *Kyne* but merely restating the clear holding of *Kyne*.

7. The Court erred in construing *Kyne* as applying only in the situation where the Board concedes error, which will never occur.

8. The Court erred in overlooking the contrary holdings of the Courts of Appeal of at least two other Circuits that *Kyne* requires an adjudication of the Board's defense of its action and not merely an examination to see if the defense is rational and in overlooking the fact that no court has ever held that the Board may escape court perusal under *Kyne* merely by making a rational defense of its actions.

9. The Court erred in failing to hold that the Board's willful disregard of the clear mandate of the Act and the

Board's refusal to equally apply the provisions of the Act deprived Appellee of due process of law.

For these reasons we urge that a rehearing be granted.

Respectfully submitted,

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APPENDIX A

Excerpts from Brief of National Labor Relations Board in the United States Supreme Court in *Leedom* v. *Kyne*, 358 U.S. 184, 79 S. Ct. 180, 3 L. ed. 2d 210 (1958)

QUESTION PRESENTED

Whether a federal district court has jurisdiction to set aside a certification issued by the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended, upon allegations by the labor organization receiving the certification that the Board failed to comply with statutory requirements in establishing the bargaining unit covered by the certification (at page 2).

SUMMARY OF ARGUMENT

D. Although we do not believe that the Board's decision on the merits is before this Court or that the correctness of the Board's position on the merits is strictly relevant to the question of reviewability which, here, the Court might consider that in a situation characterized by complete arbitrariness there would be special reasons for implying the availability of a review procedure not otherwise open. We point out, therefore, that the Board's settled interpretation of Section 9(b)(1) has rational basis although the literal language of the section may suggest that the Board is required to afford professional employees a self-determination election *whenever* it is proposed to group them in a unit with other employees, the legislative history indicates that the provision had a narrower purpose. This history shows that Section 9(b)(1) was merely aimed at protecting professional employees from being engulfed in a larger bargaining unit against their will. The Board's interpretation—which accords professional employees a self-determination election when they constitute a minority group in the proposed bargaining unit, but not where, as here, they constitute the predominant

majority—thus effectuates the Congressional purpose. Moreover Congress has been aware that the Board's interpretation of Section 9(b)(1) from the early date that it was first enunciated, has in effect acquiesced in it (at pages 11-12).

ARGUMENT

D. Since the Board's position on the statutory issue which it decided had a rational basis, judicial review is not required in this case on the theory that it may be necessary in order to correct wholly arbitrary agency action.

As argued immediately above, we do not believe that the correctness of the Board's position on the merits is strictly relevant to the question of reviewability, even though the merits involve a statutory issue. We recognize, moreover, that in the Court of Appeals the Board did not contest the district court's interpretation of the statutory provision involved (Section 9(b)(1)), but chose to stand on its jurisdictional objections. We undertake, at this point in our argument, to set forth our reasons for believing that the Board's interpretation of Section 9(b)(1) has a rational basis, not because we think that the merits are before this Court, but because the Court might consider that in a situation characterized by complete arbitrariness there would be special reasons for implying the availability of a review procedure not otherwise open.

In relevant part, Section 9(b)(1) provides:

> *Provided*, that the Board shall not (1) decide that any unit is appropriate for [purposes of collective bargaining] if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; . . .

Although a literal reading of this language may support the conclusion that the limitation was intended to apply

whenever the Board intended to group professional employees in the same unit as nonprofessional employees, the legislative history of the proviso shows that it had a narrower purpose. Thus, Section 9(f)(2) of the House Bill (H. R. 3020) required the Board to provide "a separate ballot for [*inter alia*] any . . . profession . . . within a proposed bargaining unit" and to "exclude from the bargaining unit any such group if less than a majority of the employees in it who cast ballots shall have voted for the representative that the Board shall certify for such unit" (1 Legislative History of the Labor Management Relations Act, 1947, p. 62). The purpose of this provision, the House Report stated, was to prevent "distinguishable *minorities*" from being "forced . . . into bargaining units against their will" (1 Leg. Hist. 327; emphasis added). Respecting the similar Senate provision, which became the present Section (9)(b)(1), the Senate Report explains that its objective was to preclude "covering professional personnel into general units of production and maintenance employees or general units of office and clerical employees" because the professionals, since *"their number is always small in comparison with production or clerical employees"*, might not be adequately represented (1 Leg. Hist. 417; emphasis added). And, in adopting the Senate version, the House Conference Report stated (1 Leg. Hist. 540):

> The House bill did not contain any definition of the term "professional employee" but section 9(f)(2) thereof gave professional personnel and other distinguishable groups of employees *an opportunity to exclude themselves from larger bargaining units* in which it was proposed that they be included. The Senate amendment accorded a similar treatment to professional employees and defined the term. . . . The conference agreement contains the same definition of "professional employee" as that contained in the Senate amendment, and accords to this category the same

> treatment which was provided for them in . . . the House bill [Emphasis added.][24]

In short, the legislative history of Section 9(b)(1) indicates that the provision was merely intended to provide professional employees with a self-determination election when they constituted a minority in a proposed bargaining unit, and not when, as here, they constituted an overwhelming majority. For only in the former situation was there a real danger that unless the professional employees were given an opportunity to vote separately, they might be swept, against their will, into a larger unit and submerged. On the other hand, to hold a separate election for professional employees where, as here, they constitute an overwhelming majority in the proposed unit, would not be necessary to insure that the views of the professional employees are fully reflected.[25] A separate election for professional employees in this situation would serve only to enable the professional employees to deprive other employees with a close community of employment interests—*e.g.*, the nine nonprofessionals in the unit here (see n. 2, p. 4, *supra*)—of the most suitable means of exercising their collective bargaining rights.

Accordingly, when the Board was first presented with the problem, shortly after Section 9(b)(1) was added to the Act, it concluded that the Section did not apply to the inclusion of a minor group of nonprofessional employees in a predominantly professional unit. *Continental Motors Corp.*, 77 N.L.R.B. 345, 347-348. This decision has been

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[24] See, also, 2 Leg. Hist., 1947, p. 1077; Hearings before the Senate Committee on Labor & Public Welfare on S. 55, et al., 80th Cong., 1st sess. pp. 1702-1712.

[25] In this case, for example, it is clear that the votes of the nine nonprofessionals did not affect the results of the election (R. 21-22).

uniformly followed since that time.[26] Moreover promptly after the *Continental Motors* decision, Congress was apprised of the Board's construction of Section 9(b)(1) of the Act, by Chairman Paul M. Herzog. See Hearings before the Joint Committee on Labor-Management Relations 80th Cong., 2d Sess., pp. 1147-1148. Congress was also apprised of this construction in 1949 and 1950.[27] Congress, however, has neither criticized the Board's interpretation of Section 9(b)(1), nor undertaken to modify it. Cf. *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366 (at pages 33-37).

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[26] *Standard Oil Co.*, 107 N.L.R.B. 1524, 1525-1526; *Pacific Gas & Electric Co.*, 98 N.L.R.B. No. 130; *Miller Electric Co.*, 101 N.L.R.B. 1014, 1016; *Potomac Electric Power Company*, 99 N.L.R.B. 219; *Federal Telecommunications Laboratories, Inc.*, 92 N.L.R.B. 1395, 1396-1399; *Schwarz Laboratories, Inc.*, 89 N.L.R.B. 930, 931-932; *Westinghouse Electric Corp.*, 89 N.L.R.B. 8, 29, 34; *Boeing Airplane Co.*, 86 N.L.R.B., 368, 371; *E. R. Squibb & Sons*, 83 N.L.R.B. 792; *Westinghouse Electric Corp.*, 80 N.L.R.B., 591, 594-595.

[27] Thirteenth Annual Report of the National Labor Relations Board, p. 40, n. 19; Fourteenth Annual Report of the National Labor Relations Board, p. 38.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20982

HAROLD A. BOIRE, Regional Director, Twelfth Region, National Labor Relations Board, Appellant,

vs.

THE MIAMI HERALD PUBLISHING COMPANY, Appellee.

Appeal from the United States District Court for the Southern District of Florida

(April 28, 1965)

On Petition for Rehearing

Before TUTTLE Chief Judge, JONES and GEWIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

No. 63-481-CF

THE MIAMI HERALD PUBLISHING CO., Plaintiff,

-v-

HAROLD BOIRE, as Regional Director, Twelfth Region, National Labor Relations Board, Defendant.

Preliminary Injunction

This cause came on to be heard after due notice on plaintiff's application for a preliminary injunction contained in its sworn complaint and the motion to dismiss and for summary judgment filed by defendant. The Court having considered the sworn complaint and plaintiff's Exhibit #1 and having heard oral argument from counsel for both parties in open court, the Court makes the following

FINDINGS OF FACT

1. Plaintiff is a Florida corporation engaged in the publication of a daily and Sunday newspaper in Dade County, Florida.

2. Defendant is the Regional Director for the Twelfth Region of the National Labor Relations Board (the "Board"), an agency of the United States Government. Pursuant to Section 3(b) of the Act and Rule 102.67 of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.67, the Board has delegated to Defendant as Regional Director its statutory authority to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, to determine whether a question of representation exists, to direct an election and take a secret ballot, and to certify the results thereof.

3. On June 29, 1962 Defendant as Regional Director issued a Decision and Direction of Election finding that the following employees of Plaintiff constitute a union appropriate for the purposes of collective bargaining:

> "All pressroom employees of the Employer, including pressmen, assistant pressmen, press wipers, plate wipers, reel tenders (reel operators), and apprentices and trainees to the foregoing classifications; but excluding all other employees, machinists and electricians, guards, watchmen, professional employees and supervisors as defined in the Act. . . .
> "Also eligible are employees engaged in an economic strike which commenced less than twelve (12) months before the election date and who retained their status as such during the eligibility period. . . ."

and ordering that an election be held among such employees to determine whether such employees wish to be represented for purposes of collective bargaining by the Union.

4. On July 17, 1962 Defendant issued a Notice of Election setting an election pursuant to his Decision and Direction of Election on Plaintiff's premises on July 25, 1962, and providing that employees engaged in an economic strike which commenced less than 12 months before the election date and who had been permanently replaced were eligible to vote in such election.

5. On July 24, 1962 Plaintiff instituted an action in the United States District Court for the Southern (now Middle) District of Florida, Tampa Division, No. 4458-Civ-T to enjoin the holding of the election ordered by Defendant as Regional Director, on the grounds, *inter alia,* that the actions of Defendant as Regional Director in entering his Decision and Direction of Election and in entering the Notice of Election scheduling an election at which permanently replaced economic strikers on strike for

less than 12 months could vote were arbitrary and capricious and in willful violation of the Act and the Administrative Procedure Act, and denied to Plaintiff due process of law as guaranteed by the Constitution of the United States.

6. On July 25, 1962 the Court entered an order in such case permitting the election scheduled by Defendant as Regional Director to take place but requiring the sealing of all ballots cast in such election in the ballot box and the impounding of the ballot box. On that day Defendant as Regional Director held the election and at such election permitted economic strikers who had been permanently replaced to vote.

7. On August 6, 1962 the Court entered a further order in *The Miami Herald Publishing Co.* v. *Boire, supra,* finding that the allegations of the complaint "set forth a claim that the Board's action was clearly violative of a specific demand of the Act so as to invoke jurisdiction of this Court . . ." and scheduled a hearing on the allegations of the complaint.

8. Prior to the hearing on the merits in *The Miami Herald Publishing Co.* v. *Boire,* the Board on August 22, 1962 entered an order vacating the election held July 25, 1962 and granting plaintiff's Request for Review which one member of the Board had denied on July 20, 1962.

9. On September 28, 1962 the Court entered a further order and memorandum opinion in *The Miami Herald Publishing Co.* v. *Boire, supra,* finding that the Board's order of August 22, 1962 was a valid exercise of its power and that the cause had thereby been rendered moot. The Court thereupon dismissed the action without prejudice.

10. On November 8, 1962 the Board issued a Decision on Review and Remand affirming defendant's Decision and Direction of Election. This Decision of the Board con-

firmed the Board's prior decisions "as a matter of policy to rule on such issues in its decisional process."

11. The election of July 25, 1962 having been vacated, the Decision further ordered Defendant as Regional Director to hold a "re-run" election. This "re-run" election was held but was later set aside by the United States Court of Appeals for the District of Columbia Circuit. *Miami Newspaper Printing Pressmen's Union* v. *McCulloch, et al.*, —— F. 2d —— (1963). Plaintiff was not a party to this suit.

12. The Board has admitted by certificate of its Acting Executive Secretary (Plaintiff's Exhibit #1) that the Board has never issued regulations pursuant to the provisions of Section 9(c)(3) of the Labor-Management Relations Act, as amended, with respect to the voting eligibility of employees engaged in an economic strike.

13. On August 13, 1963 Defendant as Regional Director issued an Order Directing the Counting of Impounded Ballots. Such order provides that the ballots in the representation election of July 25, 1962 will be counted at 9:30 on August 27, 1963 at Defendant's office in Miami, Florida.

14. On August 23, 1963 Plaintiff instituted this action and requested, *inter alia*, a preliminary injunction to enjoin Defendant from counting the impounded ballots of the July 25, 1962 election and preparing and issuing a tally of such ballots as threatened in Defendant's order of August 13, 1963.

15. The Plaintiff has attempted from the very beginning of the proceedings before Defendant Regional Director in June, 1962 to have determined the question of whether the decision of the Board not to issue regulations pursuant to the provisions of Section 9(c)(3) of the National Labor Relations Act with respect to the voting eligibility of employees engaged in an economic strike prior to the time the election of July 25, 1962 was held violates the terms

of the National Labor Relations Act and the Administrative Procedure Act and has been frustrated in this attempt by the Board's change of its position as reflected by its order of August 22, 1962 voiding the election of July 25, 1962.

On the basis of the foregoing the Court makes the following,

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action.

2. The complaint states a prima facie cause of action.

3. Plaintiff is entitled to have this Court determine whether the decision of the Board not to issue regulations pursuant to the provisions of Section 9(c)(3) of the National Labor Relations Act with respect to the voting eligibility of employees engaged in an economic strike prior to the time the election of July 25, 1962 was held violates the terms of the National Labor Relations Act and the Administrative Procedure Act.

4. If the adoption of regulations in accordance with the Administrative Procedure Act setting forth the voting eligibility of economic strikers is a condition precedent to permitting such strikers to vote, the election held July 25, 1962 is invalid.

5. If the Defendant Harold Boire counts the impounded ballots of the July 25, 1962 election and prepares and issues a tally of ballots as threatened in such Defendant's order dated August 13, 1963 prior to the time this Court rules on the question set forth in Paragraph 3 of these Conclusions of Law, Plaintiff will suffer irreparable injury and will be deprived of its rights under the National Labor Relations Act and the Administrative Procedure Act and will be deprived of due process of law.

6. The Court in arriving at these conclusions of law has excluded from its consideration the fact admitted

by Defendant that prior to the election of July 25, 1962 only one member of the National Labor Relations Board passed upon Plaintiff's Petition for Review.

ORDER

WHEREFORE, it is ORDERED that Defendant Harold Boire, as Regional Director, Twelfth Region, National Labor Relations Board, his successors or designees, his agents and servants and all persons acting in his stead or under his direction or control, be and they are hereby enjoined pending the final determination of this action from counting the impounded ballots of the July 25, 1962 election conducted by the National Labor Relations Board and from preparing and issuing a tally of such ballots or taking any other action in connection therewith provided the Plaintiff first give security in the sum of $500.00 for the payment of such costs and damages as may be incurred or suffered by Defendant Harold Boire as Regional Director if found to have been wrongfully enjoined or restrained, such bond to be approved by the Court or by the Clerk of the court. Defendant Harold Boire as Regional Director is forthwith directed to deliver such ballots to the Clerk of this Court to be held by such Clerk pending further order of this Court.

It is further ORDERED that Defendant's Motion to Dismiss and for Summary Judgment is denied.

DONE and ORDERED at Miami, Florida this 26th day of August, 1963.

/s/ CHARLES B. FULTON
United States District Judge

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

SEC. 3(b). The Board is authorized to delegate to any group of three of more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the rules thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 9(c)(3). No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to

> vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

Section 9(c)(3) of the National Labor Relations Act was Section 702 of the Labor-Management Reporting and Disclosure Act of 1959. § 702, 73 Stat. 532 (1959).

The remaining relevant statute is § 606 of the Labor-Management Reporting and Disclosure Act of 1959. § 606, 73 Stat. 540 (1959), 29 U.S.C. § 526.

> "The provisions of the Administrative Procedure Act shall be applicable to the issuance, amendment, or recission of any rules or regulations, or any adjudication, authorized or required pursuant to the provisions of this Act".

One of such "provisions of this Act" was Section 702, now Section 9(c)(3) of the National Labor Relations Act, quoted above.

Jurisdiction in the District Court was founded in the Judicial Code, 28 U.S.C. § 337, which provides:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c. 646, § 1, 62 Stat. 931.

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